

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policies and Rules Concerning)
Children's Television Programming)
)
Revision of Programming Policies)
for Television Broadcast Stations)

MM Docket No. 93-48

**COMMENTS
OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

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SUMMARY

Summary

INTV believes the Commission should provide more specific guidance regarding compliance with its children's television programming rules. Such guidance will help clarify the nature and scope of a station's obligation under the Children's Television Act. The Commission is not confronted with a general lack of compliance by the television industry. Uncertainty, coupled with a short term "market lag" in the production of core children's programs, has created a temporary implementation problem.

To provide greater certainty, the FCC should enact a policy statement, as opposed to rigid rules or processing guidelines, creating a "safe harbor" for stations broadcasting children's programming. The policy statement should state that any television station which broadcasts during its license term two hours of programming which responds to the educational and informational needs of children per week on average shall be considered to have complied with the programming requirements of the Act. Under the "safe harbor" proposal, at least one hour of the two would have to be standard-length programming designed to serve the educational and informational needs of children. The second hour could include short-segment programming or other programming which serves the informational and educational needs of children. The hour of core programming could consist of a one-hour program, two half-hour programs, or two different half-hour episodes of the same program. The additional hour could include short segments or entertainment programs which also serve the educational and informational needs of children.

INTV's "safe harbor" proposal is a superior policy. It would resolve much of the uncertainty associated with the current rule. At the same time, it would provide local stations with the flexibility to meet the programming needs of their local market. A station would retain full flexibility to provide programming which, while not meeting the "safe harbor" criteria, would still comply with the Children's Television Act and justify renewal (albeit via more intensive scrutiny of its programming performance).

The "safe harbor" approach differs from processing guidelines in that it would not lock the FCC into a regulatory program that might outlive its usefulness. The few problems relating to

Industry compliance appear to be temporary.

The Commission should not adopt a definition which limits core programming to programs, the primary purpose of which, is to serve the educational and informational needs of children. The existing definition contained in the statute is not infirm. Congress made no distinction based on the primary purpose of the program. Moreover, distinguishing between "primary" as opposed to "secondary" purposes is no more clear or precise than the current definition. Most significantly, a definition focusing on the term "primary" may inhibit the development of educational and informational programs that are entertaining. In order to educate and inform, children must watch the programs. Broadcasting programs children rarely watch accomplishes nothing.

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**COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its comments in response to the Commission's *Notice of Inquiry*, MM Docket No. 93-48, FCC 93-123 (released March 2, 1993) [hereinafter cited as *Notice*]. Therein the Commission sought comment on various approaches to "better implementing the requirements and underlying objectives of the Children's Television Act."¹ In particular, the Commission is exploring "whether and in what manner our rules and policies might be revised to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children."²

¹Notice at ¶10.

²*Id.* at ¶1.

I. INTRODUCTION

The FCC's renewed concern over its still young children's television rules has been prompted by perception in some corners that stations are not meeting the *programming* requirements imposed by the Children's Television Act of 1990 ("Act") and the FCC rules implementing the Act. As the Commission concluded, after briefly reviewing the state of children's programming, "We do not believe that this level of performance is in the long term, consistent with the objectives underlying the [Children's Television Act]."³ Concerns also have arisen in Congress. The House Subcommittee on Telecommunications and Finance held hearings on children's television on March 10, 1993.⁴

The Commission's conclusion hardly may be read as an indictment of the broadcast industry's intentions or efforts to comply with the new children's television programming obligations. The alleged shortcomings in performance, the Commission believes, are due to uncertainty on broadcasters' parts concerning the scope of their programming obligations:

³The perception of non-compliance with the requirements has been fostered to some extent by a study released by the National PTA, the National Education Association, and the Georgetown University Law Center's Institute for Public Representation. The study was based on an examination of station license renewal applications, which purportedly showed that stations were relying on entertainment programs to satisfy their obligations to provide programming designed to meet the educational and informational needs of children and were scheduling a "handful of new 'specifically designed' informational and educational programs" in early morning hours (5:30 - 7:00 a.m.). However, the Commission's own findings, based on the Commission staff's analysis of renewal applications, must be considered far more objective and reliable than data compiled by others. Indeed, the Commission makes no reference to any outside studies in the *Notice*.

⁴INTV Director Brooke Sectorsky testified on behalf of INTV. His testimony is attached hereto as Exhibit 1.

We wish to make clear that we do not attribute the programming performance suggested by our renewal experience to date to any unwillingness to comply or any intentional disregard for their programming responsibilities on the part of broadcasters. Rather, we believe that broadcasters may remain uncertain as to the scope of their programming obligations and that this uncertainty may largely explain the apparent lack of growth in children's programming.⁵

Therefore, the Commission has issued its *Notice* "to inquire how we might better guide broadcasters in discharging their children's programming obligations."⁶

However, the Commission also advertes to another possible factor



made a good faith effort to comply with the Act, and the performance of the television industry as a whole is quite credible in that respect. As Mr. Spector's testimony confirms, independent stations generally have complied with the new programming requirements, some in an exemplary fashion.⁹ On the other hand, as the Commission recognizes, stations have been hampered by the normal lag time in program production and development and to a lesser extent by some uncertainty as to the Commission's expectations.¹⁰

Neither of these impediments to robust implementation of the Act requires drastic action by the Commission. The supply of programming designed to meet the educational and informational needs of children is expanding both at the national and local levels. At the same time, program contracts which pre-existed the new requirements are expiring, enhancing station flexibility in acquiring and scheduling new children's programs.¹¹

The Commission also may be more explicit in terms of its expectations. However, in approaching this troublesome area, the "cure" easily could be more damaging to the public interest in providing educational and informational programming to children than the "disease."¹² The antidote or vaccines employed must be carefully formulated and delicately administered. Prescribing a massive dose of ill-considered government intrusion into

⁹See Exhibit 1 at 15-18.

¹⁰*Id.* at 3-12.

¹¹*Id.*

¹²To be sure, the Commission is not called upon here to combat an epidemic of the plague, but to cure a mild temporary condition and prevent its recurrence.

broadcast program content would produce devastating side-effects or worse, a new strain of regulation resistant to all but constitutional bromides. This is a particularly meaningful concern where the Commission might more easily be swayed by the intensity of feeling which surrounds any issue involving the welfare of children. Finally, the Commission must remain cognizant of one fundamental reality -- the economics of independent broadcast television and the efficacy of the Act require that educational and informational children's programming achieve popularity. The most highly-acclaimed educational and informational programming for children will serve no purpose if children's viewing migrates to sitcoms the moment it appears on the screen.¹³ Therefore, licensee discretion and flexibility remain critically important in responding to consumer demand and the public interest in the dynamic new video marketplace.

INTV, nonetheless, recognizes that concern over this issue will remain vibrant and visible for the near term and leave the Commission no alternative to taking some remedial action. INTV has acknowledged the public interest obligations of broadcasters and, indeed, supported the Children's Television Act. INTV has sought to inform independent stations of their obligations under the Act, and independent stations want to comply

¹³This is particularly true in the after school hours when independent stations generally schedule children's programming. Children who have spent the day dieting on an unrelenting stream of education and information will have little incentive for more of the same when they walk in the door from school each day.

with the Act's requirements.¹⁴ They also want the assurance of having complied when they apply for renewal of their licenses.

In view of the above, INTV offers the following proposal in response to the Commission's *Notice*:

The Commission should issue a policy statement stating that any television station which broadcasts during its license term two hours of programming which responds to the educational and informational needs of children per week on average shall be considered to have complied with the programming requirements of the Act. INTV's proposal, thus, is for a "safe harbor" approach which would clarify the Commission's general expectations and permit stations to protect their licensee status from challenges based on uncertain standards. At the same time, stations still could elect to satisfy the programming obligations of the Act in other ways. However, the Commission could subject their renewal applications to closer scrutiny, and they would enjoy no protection from possible designation of issues relating to their satisfaction of the programming requirements of the Act.

Under INTV's proposal, at least one hour of the two would have to be standard-length programming designed to serve the educational and informational needs of children. The second hour could include short-segment programming or other programming which served the informational or educational needs of children.

¹⁴A copy of the *INTV Primer on Children's Television Regulation* is attached hereto as Exhibit 2.

in new educational and informational programming for children in a more predictable, stable market.

Finally, of course, specificity will encourage stations which have been unsure of their obligations to provide at least the minimum of programming expected by the Commission. This is likely to produce an increase in the overall amount of programming responsive to the educational and informational needs of children as intended and envisioned by Congress.

No one, least of all INTV, can ask for more detailed regulation without some reservation. As is well-known, the tendency to run to the safe harbor may result in a bland sameness to station efforts to serve the needs of children (*e.g.*, "minimums" become "maximums").

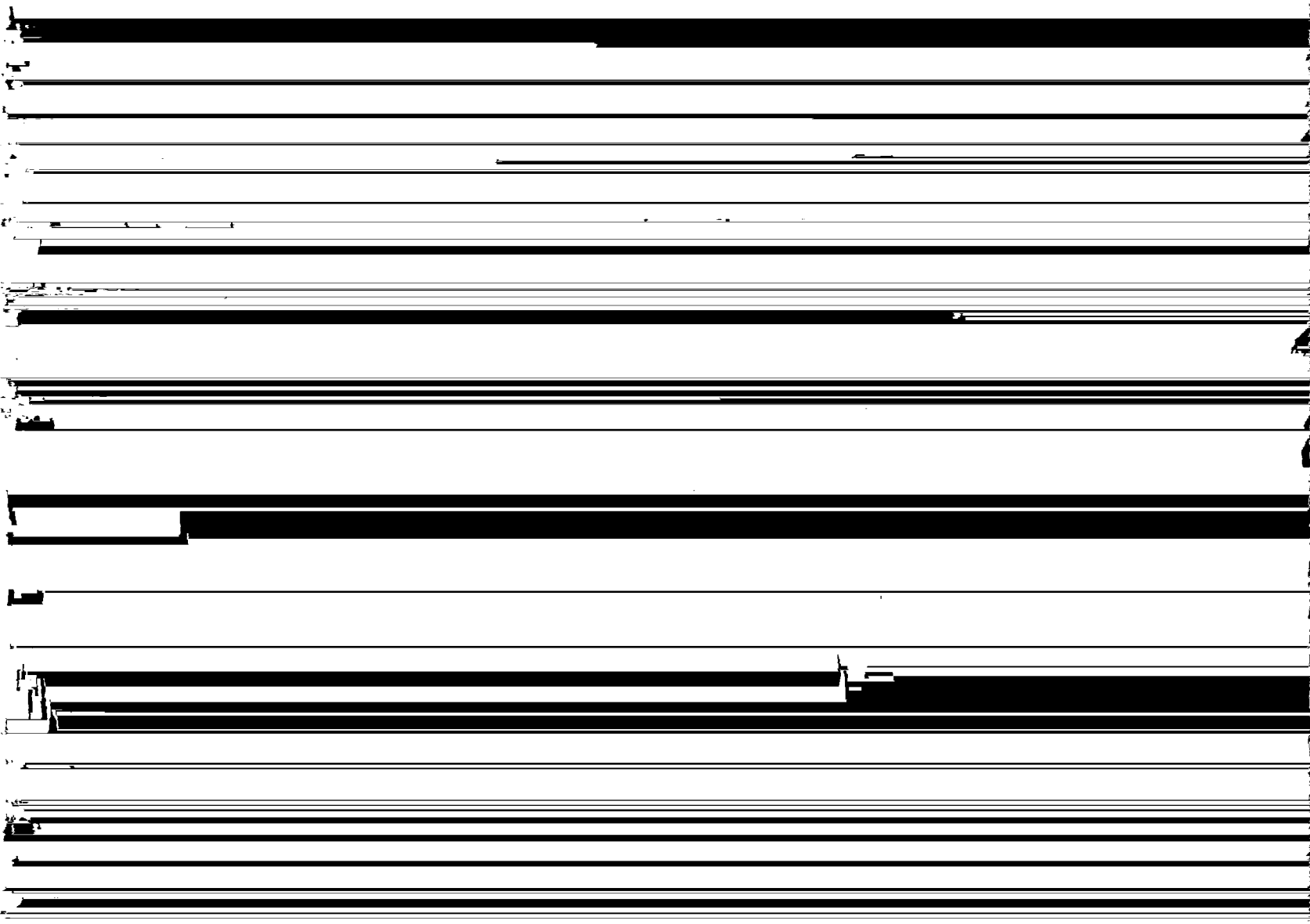
On balance, however, given the present degree of uncertainty, the advantages outweigh the disadvantages, at least in today's environment. Still, INTV cannot overemphasize the delicacy of the Commission's task. The Commission must exercise restraint even in its effort to be more specific.

III. THE COMMISSION SHOULD ACT VIA ISSUANCE OF A POLICY STATEMENT IN LIEU OF RULES OR PROCESSING GUIDELINES.

INTV submits that a policy statement setting forth a safe harbor level of performance provides the most minimal intrusion into licensee discretion while still recognizing the need for some certainty with respect to a station's obligations under the Act. Stations would retain full flexibility to provide programming which, while not meeting the safe harbor criteria, still would comply with the Act and justify renewal (*albeit* via more intensive scrutiny of its programming performance under the Act).

Such a safe harbor policy would differ markedly from rules. Rules setting forth specific quantity, type, and time requirements with respect to educational and informational programming for children would eliminate licensee discretion completely and straitjacket station efforts to be creative or responsive to changes in the marketplace.

Rules also lock the Commission into a regulatory program which can be expected to outlive its usefulness. The problem faced today by the Commission appears to be temporary, a function of normal lag time in program development, production, and distribution. After another round of



The practical effect of a policy statement may appear no different than the practical effect of a processing guideline. However, the precedent of returning to processing guidelines as an acceptable regulatory device would be dangerous. As long as the basic "safe harbor" is established, the least intrusive regulatory device should be favored. Therefore, INTV proposes that the

This approach would credit both standard length educational and informational programs, as well as other programs which respond to the educational and informational needs of children. Because the policy would employ a safe harbor concept, stations would not actually be required to broadcast the specified amount of programming. However, if they failed to qualify for the safe harbor, they would have to demonstrate through other programming, etc., that they had complied with the Act.

Such a standard would raise the threshold of compliance and require stations wishing to enter the safe harbor to increase the amount of educational and informational programming for children. This would satisfy the basic problem perceived by the Commission, *i.e.*, no increase in the amount of educational and informational children's programming since the Act went into effect. Moreover, it would provide an unambiguous and realistic standard which would eliminate the current level of uncertainty on this critical element of compliance with the Act.

V. THE COMMISSION SHOULD NOT ADOPT A DEFINITION WHICH LIMITS CORE PROGRAMMING TO PROGRAMS THE *PRIMARY* PURPOSE OF WHICH IS TO SERVE THE EDUCATIONAL AND INFORMATIONAL NEEDS OF CHILDREN.

Stations should retain flexibility in designating which programs are core programs. The Commission has made clear, and the industry

Second, a definition looking to the primary versus secondary purpose of a program is no more clear or precise than the current definition. Indeed, such judgments would be doubly subjective.

Third, and in all reality, most significantly, a definition looking to the primary versus secondary purpose of a program would denigrate the need to provide programming for children which is both educational and informational *and* entertaining. Broadcasting programs children rarely watch accomplishes nothing. Under such a definition stations would be tempted to cut their losses and substitute inexpensive, poor quality, unpopular programs which, nonetheless, were primarily educational and informational.¹⁷

Therefore, the Commission should consider its present definition

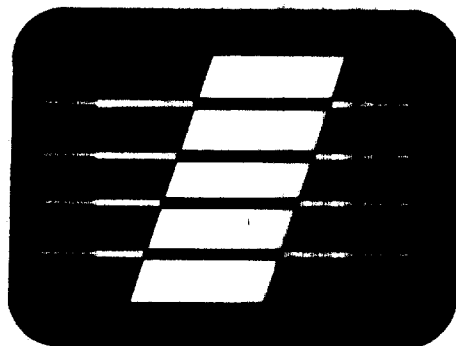


VI. CONCLUSION

INTV has made a separate proposal for a program tailored response to

COMMENTS OF INTV • MM DOCKET NO. 93-48 • MAY 7, 1993

EXHIBIT 1



Testimony of

**BROOKE SPECTORSKY
Vice President & General Manager
WUAB-TV, Channel 43, Cleveland, OH**

Before the

**Subcommittee on Telecommunications and Finance
Committee on Energy and Commerce
U.S. House of Representatives**

**Washington, D.C.
March 10, 1993**

Testimony of
Brooke Sectorsky
Vice President, General Manager
WUAB-TV, Channel 43, Cleveland, Ohio

Executive Summary

INTV worked with this Subcommittee to enact the 1990 Children's Television Act. We continue to support its objective -- to provide quality programming that meets the educational and informational needs of children.

The Act has created a marketplace for the creation of new "core" programming that meets the informational and educational needs of children. However, the Act has been in place for only a year and a half. New innovative programming is costly and cannot be created overnight. It takes time to develop programming that is educational, informational and will be popular with child audiences.

In the past year, there has been an expanding supply of children's programming in the syndication market that comports with the statute's requirements. Moreover, Independent stations are beginning to produce local programming that is specifically designed to meet educational and informational needs. The quantity and quality of such programming will increase.

Most television stations are faithfully implementing the Act. Stations that attempt to rely solely on general entertainment formats or animated entertainment series to meet their obligation to provide educational and informational programming are in error. The statute requires more.

The goal of the statute should be the creation of popular children's programming that meets educational and informational needs. It does little good to broadcast educational programming that is not watched by children.

All the elements exist for stimulating the market. The statute has created the demand. Stations and producers are beginning to develop quality programming. It would be

Good morning, my name is Brooke Sectorsky, and I am vice president and general manager of WUAB-TV, Channel 43 in Cleveland, Ohio. I am currently on the Board of Directors of INTV and am speaking today on behalf of my station and all Independent television stations.¹

I appreciate the opportunity to address you today on the subject of Children's television. It is an issue of utmost importance to the children of this nation and the broadcasting industry. The INTV board voted unanimously to support the Children's Television Act of 1990. INTV worked with this Subcommittee and its counterpart in the Senate to get the legislation passed. We continue to support the goals of this important statute.²

My objective today is to provide the Subcommittee with a real-world assessment of the Children's Television Act. It is not to offer excuses for the television industry. In most instances

¹The Association of Independent Television Stations, Inc. is a trade association representing local television stations that are not affiliated with ABC, NBC or CBS. About half of our members are

television stations have faithfully implemented the statute. Is our record perfect? At this stage, the answer is no. Is there room for improvement? The answer is definitely yes. Nevertheless, it is important for the Subcommittee to understand the developing market for new children's programming. This new programming is specifically designed to meet the educational and informational needs of children.

The creation of this market is a direct result of the 1990 Children's Act. I firmly believe that many of your concerns are the result of transitional problems associated with the evolution of this market. Both the Congress and the broadcasters would like to see the market develop at a faster pace. All of us are working towards a common goal -- providing better programming for our

I. THE DEVELOPING MARKETPLACE FOR PROGRAMMING THAT MEETS THE EDUCATIONAL AND INFORMATIONAL NEEDS OF CHILDREN.

The most important part of the Act's programming obligation is the provision of "core" programming that specifically meets the educational and informational needs of children under 16 years of age. Accordingly, television stations cannot rely on general "family" entertainment or traditional cartoons to meet this part of our obligation. A station that relies solely on such programming to completely satisfy its obligations does so at its peril. Moreover, while the statute and the FCC's implementing rules do not mandate quantitative minimums, it is fairly clear to me that stations must provide some amount of standard length programming.

The Act has created a demand for the production and development of specific programs that fulfill the statutory